

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in this cause is set out in the Transcript of the Record filed herein at pages 234 to 237.

II.

Jurisdiction.

1. A final judgment has been rendered by the United States Circuit Court of Appeals for the Seventh Circuit, and this Court has jurisdiction to review this judgment under Sec. 240 of the Judicial Code as amended and under its power to secure uniformity among the Circuit Courts of Appeals for the ten circuits.

2. The date upon which this judgment became final was November 26, 1941.

3. We believe the jurisdiction is sustained by the cases cited in support of our reasons for granting the writ.

STATEMENT OF THE CASE.

The evidence for the government was largely that of one witness, Dorothy Sullivan, an informer, a drug addict, and an ex-convict. A number of colored people, from whom she made purchases of drugs without the knowledge of petitioner, also testified.

In support of the said two counts upon which petitioner was convicted, the chief government witness testified (Tr. 41) that she made a purchase of narcotics from petitioner on March 11, 1941, and another purchase (Tr. 44) on March 17, 1941.

In addition to these alleged transactions the government introduced evidence of sales of narcotics by various persons to the said Dorothy Sullivan and to others. These sales occurred as follows:

March 8, 1941 (Tr. 38), by Stanley Moy to Dorothy Sullivan and Emma Ludwig, a defendant;

March 17, 1941 (Tr. 46), by Austin Edge to Dorothy Sullivan;

March 22, 1941 (Tr. 54), by Henry Driscoll to Dorothy Sullivan;

March 22, 1941 (Tr. 56), by Harry Decker to Dorothy Sullivan;

March 26, 1941 (Tr. 57), by Austin Edge to Dorothy Sullivan;

March 27, 1941 (Tr. 59), by Lucille Williams to Dorothy Sullivan;

April 2, 1941 (Tr. 61), by Foster Mosley to Dorothy Sullivan;

April 2, 1941 (Tr. 62, 63), by Booker, whose real name is John Bridges, to Dorothy Sullivan;

April 3, 1941 (Tr. 65), three sales by Lucille Williams to Cheatam, Bubbles and Hudson;

April 9, 1941 (Tr. 66), by James Tillman to Dorothy Sullivan, and at the same time and place a sale by James Tillman to Lucille Williams.

Austin Edge (Tr. 96, 97) testified to two sales to defendant Emma Ludwig, and three sales (Tr. 100) to Dorothy Sulivan.

Eddie Jackson (Tr. 105) testified to the purchase from Foster Mosley of narcotics.

Earl Nettles (Tr. 109, 110) testified to purchases of narcotics from Foster Mosley and James Tillman.

James Tillman (Tr. 111) testified that he purchased narcotics from Foster Mosley and that he never sold Dorothy Sullivan anything and did not know her.

Ruford Kelley (Tr. 114) testified that he purchased narcotics from Austin Edge and Lucille Williams.

Glen Howard (Tr. 121) testified that he purchased narcotics from Foster Mosley.

Mabel Jones (Tr. 124, 126) testified she accompanied the witness Glen Howard to 2222 Dearborn street, Chicago, and received narcotics from him to give to Earl Nettles.

The petitioner on the trial (Tr. 175) denied that he knew government's witness Dorothy Sullivan; denied that he sold to her any narcotics or ever saw any narcotics, or knew what they were; denied (Tr. 176) that he ever had or concealed or transported narcotics or that he ever conspired to do so. He also denied (Tr. 175) that Emma Ludwig ever called him on the telephone; denied (Tr. 174) that Dorothy Sullivan was in his place of business at any time.

Emma Ludwig, a defendant (Tr. 150) denied that on March 11, 1941, as testified by Dorothy Sullivan, or at any other time, she called petitioner on the telephone, or had any conversation with him about narcotics; denied that she ever called on the telephone and asked for Sol.

Manuel Menendaz, a defendant (Tr. 144) denied that he, as testified by Dorothy Sullivan, asked petitioner about any dope or narcotics; denied (Tr. 143) that he was in petitioner's tavern with Dorothy Sullivan on March 22, 1941, but testified that he was in Gary, Indiana, all that evening; denied (Tr. 143) that he was in petitioner's place of business with Dorothy Sullivan on the 17th or 22d of March, 1941.

Herta Simlak (Tr. 172) testified that she was in petitioner's place of business of the 11th and on the 17th of March, 1941, and that Dorothy Sullivan was not there on either of said dates.

Saline Bailey (Tr. 166) testified that she was employed by petitioner in his place of business for two years and she was there during March and April 1941, and that she did not see Dorothy Sullivan there on the 11th, 17th or 22d of March, 1941, or at any other time.

Joseph Mogley (Tr. 164) testified that he worked tending bar at petitioner's place of business on March 17, 1941, and March 22, 1941, and that he did not see Dorothy Sullivan in the place on either of said dates, or at any other time.

Rev. John Robinson Pickells (Tr. 163), Rector of Trinity Episcopal Church, across the street from petitioner's place of business; Andrew J. Tilley (Tr. 170), President of Munger's Laundry, situated in the same neighborhood; Raymond Allison (Tr. 171), President of Domestic Linen & Towel Supply Co., a laundry; Ralph Lee Goodman (Tr. 169), Chairman of the Business Research Committee of the Chicago Association of Commerce, the Chicago Crime Commission and other organizations; John Lass, connected with the Sunshine Laundry Company for twenty-five years, and Fred Lenz, an employee of Munger's Laundry, all testified that the general reputation of petitioner in the

neighborhood in which he lived among his friends and associates for truth and veracity and for being a law abiding citizen was good.

At the conclusion of all the evidence in the case (Tr. 205) petitioner moved the Court that the indictment against him and each count thereof be dismissed as to him, and for a directed verdict of not guilty upon each count. This motion was denied and petitioner excepted.

The court thereupon gave to the jury the instructions set out in the transcript of the record (Tr. 181-191).

Among the instructions so given was (Tr. 189) the following instruction:

> "The defendant Sol Feinberg has put in evidence his general reputation for being a peaceful, law abiding citizen. Such evidence is permissible under the law and is to be considered by the jury as a circumstance in this case along with all other facts and circumstances in evidence."

Specification of Errors.

Comes now the petitioner Sol Feinberg, by his counsel, and says that in the record and proceedings in the United States Circuit Court of Appeals for the Seventh Circuit there are manifest errors.

1. The United States Circuit Court of Appeals erred in not holding that it was error for the trial court to permit the introduction in evidence of different and disconnected minor conspiracies and criminal acts under Count 32 and Count 17 with which petitioner was not identified or in any manner connected.

2. The United States Circuit Court of Appeals erred in not holding that it was error for the trial court to give

to the jury the instruction upon the weight to be accorded to character testimony.

3. The trial court erred in not instructing the jury as to the weight to be accorded to the evidence of petitioner's good reputation for truth and veracity.

4. The United States Circuit Court of Appeals erred in not holding that it was error for the trial court to hold there was no variance between the indictment and the evidence.

5. The Circuit Court of Appeals erred in not holding that the evidence does not support the verdict.

6. The Circuit Court of Appeals erred in not holding that the verdict is opposed to the law and the evidence.

7. The Circuit Court of Appeals erred in not holding that it was error for the trial court to refuse to grant the motion of said Feinberg at the end of all the evidence in the case to find the said Feinberg not guilty.

Respectfully submitted,

EVERETT JENNINGS,
Counsel for Petitioner.

GEORGE D. SULLIVAN,
PAUL CRAIG,
Of Counsel.

ARGUMENT.

Jurisdiction.

This Court has power to review this case under Section 240 of the Judicial Code as amended, and under its authority to secure uniformity of decision among the Courts of Appeals in the ten Circuits.

Sec. 240, Judicial Code.

Maguum Import Co. v. *De Spoturno,* 262 U. S. 159, 163; 67 L. Ed. 922, 924;

Cameron v. *U. S.,* 231 U. S. 710, 716.

Character testimony having been introduced by petitioner, the Court gave to the jury (Tr. 189) the following instruction:

> "The defendant Sol Feinberg has put in evidence his general reputation for being a peaceful, law abiding citizen, such evidence is permissible under the law, and is to be considered by the jury as a circumstance in this case along with all other facts and circumstances in evidence."

The decision of the Circuit Court of Appeals of the Seventh Circuit upholding the said instruction conflicts with the decisions of the Circuit Court of Appeals of the Eighth Circuit, holding that the giving of a similar instruction was error.

Salinger v. *U. S.,* 23 Fed. (2d) 48, 52.

Miller v. *U. S.,* 120 Fed. (2d) 968, 972.

The decision herein in our view conflicts with the applicable decisions of this court.

Edgington v. *U. S.,* 164 U. S. 361, 366; 41 L. Ed. 467, 471.

The Circuit Court of Appeals erred in approving the said instruction given by the trial court herein.

The Circuit Court of Appeals of the Eighth Circuit in *Salinger* v. *U. S.*, 23 F. (2d) 48, 52, held that the defendant was entitled to an instruction to the effect: (1) that the purpose and function of such evidence is to raise a reasonable doubt; (2) that it is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful; and (3) that when it is considered with the other evidence, if a reasonable doubt is created as to the defendant's guilt he is entitled to be acquitted.

In *Sunderland* v. *U. S.*, 19 F. (2d) 202, 215, the Circuit Court of Appeals of the Eighth Circuit say:

> "That where evidence of good character is introduced in behalf of the defendant, he is entitled, and especially if request is made, to an instruction setting forth (1) the purpose and function of such evidence, viz. to generate a reasonable doubt; and setting forth (2) the probative status of such evidence, viz. that it is entitled to be considered whether the other evidence in the case be clear or doubtful; and setting forth (3) the possible effect of such evidence, viz. that when it is considered with the other evidence, if a reasonable doubt is created as to defendant's guilt, he is entitled to an acquittal. We are constrained to hold that the charge given in the instant case did not properly fulfill any one of these requirements."

Under these cases the instruction in the instant case was erroneous.

The instruction was bad for the further reason that it ignored (Tr. 163) the testimony of Feinberg's good character for truth and veracity. As petitioner testified (Tr. 174) in the case his good reputation for being truthful

was material and important, and the jury should have been instructed upon that portion of the evidence.

Character evidence in his favor should have been of the greatest value to the defendant Feinberg. A full correct instruction on that subject was most important. The charge against him was supported practically solely by the testimony of an informer, and ex-convict, a drug addict, and one whose character was marked by every scar that can be made by a dishonorable blade.

The Circuit Court of Appeals erred in not holding that it was erroneous for the trial court to permit the introduction in evidence of minor conspiracies and criminal acts with which petitioner was not identified or in any manner connected.

The conspiracy count (Tr. 29, 30), after the usual introductory allegations in which the defendants are named and the division and district stated, charges that:

> "On and between, to wit, May 15, 1939, and April 11, 1941, at Chicago, aforesaid, in the division and district aforesaid, then and there knowingly, unlawfully, wilfully and feloniously did conspire, combine, confederate and agree together, and with divers other persons, whose names are to the said grand jurors unknown, to commit divers offenses, against the United States, that is to say, the offense of unlawfully receiving, concealing, buying, selling and facilitating the transportation and concealment of large quantities of certain derivatives of opium, to wit, morphine and codeine mixture and heroin hydrochloride, the exact amounts of which are to the said grand jurors unknown, after being imported contrary to law; all such receiving, concealing, buying, selling and facilitating the transportation and concealment of said morphine

and codeine mixture and heroin hydrochloride being in violation of the Act of Congress approved May 26, 1922, and known as the Narcotic Drugs Import and Export Act."

The conspiracy charged is a general one. Proof of different and disconnected smaller conspiracies will not sustain a conviction.

Marcante v. *U. S.*, 49 F. (2d) 156, 157.

Wyatt v. *U. S.*, 23 F. (2d) 791, 792.

U. S. v. *Wills*, 36 F. (2d) 855, 857.

Terry v. *U. S.*, 7 F. (2d) 28, 30.

U. S. v. *Beck*, 118 F. (2d) 178, 182.

In the *Marcante* case, 49 F. (2d) at pages 156, 157, the court say:

"He must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose. A conspiracy is bottomed on an agreement to accomplish an illegal act and without such agreement there can be no conspiracy; a conspiracy 'is a partnership in criminal purpose.' *United States* v. *Kissel*, 218 U. S. 601, 31 S. Ct. 124, 126; 54 L. Ed. 1168; *Brown* v. *Elliott*, 225 U. S. 392, 32 S. Ct. 812, 56 L. Ed. 1136; *McDonnell* v. *United States* (C. C. A. 1) 19 F. (2d) 801; *Allen* v. *United States* (C. C. A. 7) 4 F. (2d) 688; *Rudner* v. *United States* (C. C. A. 6) 281 F. 516.

"On the other hand, there may be two or more conspiracies in the same state to violate the same law. If such be the case the government may not convict all the members of all the conspiracies under a charge of membership in one large conspiracy."

In *Wyatt* v. *U. S.*, 23 F. (2d) 791, 792, the court used this language:

> "When, as here, one large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain convictions; nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction. *Terry* v. *United States* (C. C. A.) 7 F. (2d) 28, 30; *United States* v. *McConnell* (D. C.) 285 F. 164, 166."

The purchase (Tr. 38, 39) by Vic Shaw and Dorothy Sullivan from Stanley Moy of an ounce of heroin, March 8, 1941; the purchase (Tr. 46) by Dorothy Sullivan from Austin Edge on March 17, 1941, of narcotics; the purchase (Tr. 47) by Dorothy Sullivan from Austin Edge and Lucille Williams on March 20, 1941, of narcotics; the purchase (Tr. 48, 49) by Dorothy Sullivan from Austin Edge on March 20, 1941, and on March 21, 1941 (Tr. 50) of narcotics; the purchase (Tr. 56) by Dorothy Sullivan from Harry Decker on March 22, 1941, of heroin; the purchase (Tr. 56, 57) by Dorothy Sullivan from Austin Edge or Henry Driscoll on March 26, 1941; the purchase (Tr. 58, 59) by Dorothy Sullivan from Lucille Williams on March 27, 1941; the purchase (Tr. 60, 61) by Dorothy Sullivan from Foster Mosley on April 2, 1941; the purchase (Tr. 62, 63) by Dorothy Sullivan from Harry Decker or one Booker on April 2, 1941; the purchase (Tr. 64, 65) by Lou Cheatam from Lucille Williams on April 3, 1941; the purchase (Tr. 65, 66) by Dorothy Sullivan from James Tillman (Wingey) on April 8, 1941; the purchase (Tr. 67) by Dorothy Sullivan and Rupert Kelly from Austin Edge on April 9, 1941, were all made and done without the knowledge, acquiescence or consent of petitioner.

This evidence was incompetent in support of count 17 or count 32, and was highly prejudicial to petitioner on both of said counts.

The evidence does not support the verdict.

The verdict is opposed to the law and the evidence.

The case against petitioner as made by relevant and material evidence stands upon the testimony of Dorothy Sullivan. She was an informer (Tr. 73, 135), a former inmate of three penitentiaries (Tr. 71, 72, 88) on conviction for larceny, and a narcotic addict (Tr. 44, 54, 73, 74, 77, 80, 81, 82, 84, 93). She was so untrustworthy that Narcotic Agent Walsh watched her closely whenever he advanced money to her to be used in the purchase of narcotics (Tr. 79). She was not trusted by the government out of sight of the narcotic agent. The government relied upon her unreliable testimony when she was placed upon the witness stand, and what is even stranger the jury found petitioner guilty.

Petitioner (Tr. 174) quit school when he was fourteen years of age and worked at Lew's jewelry store for two years; he then bought a truck and engaged in the vegetable business. After three years in that business he sold it and bought a grocery store. This store he conducted until about five years ago, when he bought his present tavern and restaurant, and later added another store for the conduct of the package liquor business. The grocery store and the tavern were in the same community. All of this was transacted in Chicago.

Petitioner denied all the charges (Tr. 175, 176). He was corroborated by Emma Ludwig (Tr. 150, 151, 152), by Manuel Menendaz (Tr. 142, 143, 144), by Joseph Mogley (Tr. 164, 165), by Herta Simlack (Tr. 172), and by Saline Bailey (Tr. 167, 168).

A half dozen prominent men testified that his general reputation for truth and veracity and for being a law abiding citizen was good.

Chief among these was Rev. John Robinson Pickells (Tr. 163), who was Rector of Trinity Episcopal Church. Others were Ralph Lee Goodman (Tr. 169), chairman of the Business Research Committee of the Chicago Association of Commerce and member of the Chicago Crime Commission; Andred J. Tilley (Tr. 170), president of Munger's Laundry; Raymond Allison (Tr. 171), president of Domestic Linen and Towel Supply Co., a laundry, and others.

The evidence in our view of the case not only did not prove the guilt of petitioner, but was of such strength in his favor as to establish beyond a reasonable doubt that he was not guilty under either count seventeen or count thirty-two.

The independent conspiracies and disconnected criminal acts introduced against petitioner upon the trial on both count thirty-two and count seventeen were erroneously admitted in evidence and resulted in the verdict being against the law as well as against the evidence.

The Circuit Court of Appeals (Tr. 204) erred in not reversing the case because the trial court denied the motion of petitioner, at the close of all the evidence on the trial, for a directed verdict of not guilty.

The motion should have been allowed by the trial court because, as heretofore argued, there was not sufficient competent evidence to make a case against petitioner and because there was a variance between the indictment and the proof due to the erroneous introduction of independent separate and disconnected conspiracies and other criminal acts.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that justice may be done, and to that end a writ of certiorari should be granted by this Court and the decision of the United States Circuit Court of Appeals for the Seventh Circuit should be reviewed and reversed by this Court.

Respectfully submitted,

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